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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
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JAMES H. McKENNEY,

No. [redacted]223

THOMAS M. PATTERSON,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Defendant in Error.

Error to the Supreme Court of the State of Colorado.

BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

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THE SMITH-BROOKS PRESS, DENVER

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STATEMENT.

The facts in this case, as shown by the record, are substantially as follows:

That The News-Times Publishing Company, a corporation organized and existing under the laws of the state of Colorado, was engaged during the month of June, 1905, in publishing two daily newspapers in

the city and county of Denver, in said state, which newspapers were known as the Rocky Mountain News and the Denver Times; that each of these newspapers was a metropolitan daily, of general circulation, not only in the city of Denver and state of Colorado, but in the neighboring cities and states; that on the 24th, 25th, 26th, 27th and 28th days of June, of said year, there appeared in said newspapers certain articles and a cartoon, as set forth in the information at pages 4-15 of the printed record herein, charging in effect that the Supreme Court of the state of Colorado, and certain of its judges, had been influenced by corrupt motives in the rulings theretofore made in certain causes commonly known as the "County Offices Election Cases" then pending in that court and not finally disposed of, and that they would continue to be so influenced in the final disposition of such cases as well as in the determination of what was commonly known as the "Auditorium Case," in which no action had yet been taken by the court; that while a decision had been handed down in each of the "County Offices Election Cases," the time for filing petitions for rehearing had not expired, but such petitions were filed and undisposed of on the date of the last publication hereinafter mentioned, and upon such hearing the original judgments in all of said causes, save one, were materially modified; and that the "Auditorium Case," at the time of such publications, had been argued orally and submitted, and was then under consideration for final decision.

That Thomas M. Patterson, the plaintiff in error herein, during all the times of such publications, was one of the directors and officers and was the owner of a majority of the capital stock of The News-Times

Publishing Company, and was in fact the manager and editor in chief of each of the said newspapers, and admitted that he was responsible for the publication and circulation of the articles and cartoon set out in said information.

That in the Rocky Mountain News of June 30, 1905, there appeared an interview with the plaintiff in error herein, as set forth in the information at pages 12-4 of the printed record, in which he stated that he was responsible for each of the articles appearing in said newspapers on the dates above mentioned, and that at the proper time he would endeavor to demonstrate his right to compose or approve and publish them.

That thereafter, and on said 30th day of June, 1905, the attorney-general of the state of Colorado appeared before the Supreme Court of that state and asked permission to be allowed to file an information in the name and on behalf of the People of the State of Colorado against The News-Times Publishing Company and Thomas M. Patterson.

That permission being granted, the attorney-general filed such information—it being signed by him *ex officio*—setting forth the articles and cartoon published in said newspapers, and asking for a rule upon the respondent Thomas M. Patterson, requiring him to appear in court, on a day to be named, and show cause, if any he had, why he should not be held in contempt of court, and punished accordingly, for the publication and circulation of said articles and cartoon.

That thereafter, and on the same day, an order was entered in said court setting forth the foregoing facts, and a rule was granted against said respondent,

requiring him to appear in that court at ten o'clock a. m. on the 23rd day of October, A. D. 1905, for the purpose of pleading to said information and to show cause, if any he had, why he should not be held in contempt of court and be punished accordingly, and a copy of this order and rule was served upon him by a bailiff of the court. (The unusual length of time given to the respondent within which to answer was for the purpose of not interfering with an official trip to the Philippines, which had previously been planned by him and others.)

That on the 23d day of October, 1905, the respondent, Thomas M. Patterson, filed a motion to quash the information and writ in said cause, upon the grounds that the information was not verified, and that no affidavit was made, filed or presented to the court at or prior to the filing of said information, and, therefore, the prosecution was in violation of sections 7 and 25 of article II of the Constitution of the state of Colorado; that said prosecution was further in violation of section 10 of the same article, guaranteeing the liberty of the press, and also in violation of the Fourteenth Amendment to the Constitution of the United States; that said information did not state facts sufficient to constitute the charge of contempt against him.

That on November 13, 1905, this motion was overruled and the respondent was given until the following Monday, November 20th, to further plead; that on the last mentioned date, the respondent, Thomas M. Patterson, filed an answer denying that the "County Offices Election Cases," before mentioned, were pending in said court at the time of the publica-

tion of said articles and cartoon, although admitting that the time had not elapsed within which petitions for re-hearing might be filed, and that such motions for re-hearing were later filed and passed upon by said court; that The News-Times Publishing Company was a corporation duly organized and existing under the laws of the state of Colorado, and that he was, during all of said time, the principal stockholder of said company, and was the editor of said newspapers; that the several articles printed therein and set forth in the information, were either written by him or published with his approval and consent, except that the headline alleged to be above and associated with the cartoon concerning which complaint was made, and the subheads contained in said articles, were not written or approved by him before their publication; that none of the innuendoes inserted in the body of said articles or associated with them by the attorney-general in the information, except such as identified the said Supreme Court, or the judges thereof, with reference to the terms "court," "judge" or "judges," were justified or warranted by the text of the articles; that none of the said articles were contemptuous of the said Supreme Court, or of any of its judges, but that they were legal and justifiable comment upon grave and important public issues; that the articles and cartoon, as set forth in the information, were justifiable on account of certain facts and events occurring before their publication; and that such facts and events justifying the publication of such articles and cartoon were as set forth at great length in his answer. (Appearing in the printed record herein at pages 20-69.)

That on the 24th day of November, 1905, the attorney-general filed a motion for judgment upon the pleadings; and on November the 28th, respondent being present pursuant to said motion, the court proceeded to hear and determine the same upon the pleadings, and at the coming in of court upon the following day, announced its readiness to render its decision thereon; but upon observing the absence of the respondent, notified his counsel that respondent must be present at the ruling; that his counsel informed the court that respondent, in order to save his technical rights, was not present, and would not be, unless an attachment should be issued for him out of that court.

That an attachment was accordingly issued for him, and thereafter, on the same day, when respondent was brought into court, the court sustained the motion and announced its findings upon the pleadings to be, that the respondent, Thomas M. Patterson, was guilty of cotempt of court as charged in the information.

That upon inquiring of the said respondent if anything further he had to say why judgment should not be pronounced against him, in accordance with the finding, he arose, and, addressing the court, reasserted the matters set up in the information and in his answer, and stood upon the sufficiency of the answer as a defense.

That making no request for permission to introduce evidence in mitigation or extenuation of the offense, the court proceeded to announce its judgment, that he be fined in the sum of one thousand dollars and stand committed to the common jail of the city

and county of Denver until such fine was paid or otherwise satisfied by law, and that he pay all costs incurred in said proceeding.

That the respondent then asked for a stay of proceedings for sixty days in order that he might prepare a bill of exceptions and apply for a writ of error and supersedeas to the Supreme Court of the United States, which request was granted by the court, and a writ of error and supersedeas was thereafter allowed by Mr. Justice Brewer of this court.

ERRORS ASSIGNED.

Plaintiff in error alleges that the following errors were committed by the Supreme Court of Colorado in the trial of this cause:

First. In issuing the rule on respondent to appear and show cause why he should not be punished for contempt.

Second. In not requiring the information filed in the cause to be verified before issuing the said rule to show cause.

Third. In making and entering of record, on the 20th day of October, 1905, an order permitting an affidavit in support of said information to be made and filed, and in overruling and disallowing the objections of plaintiff in error, Thomas M. Patterson, to the filing of said affidavit.

Fourth. In overruling the motion of the plaintiff in error, Thomas M. Patterson, to quash the information and writ issued thereon in said cause.

Fifth. In ordering the plaintiff in error, Thomas M. Patterson, to file his answer in the cause.

Sixth. In issuing an attachment for and causing the plaintiff in error, Thomas M. Patterson, to be arrested and brought into court on the 29th day of November, 1905.

Seventh. In sustaining the motion of the attorney-general of the state of Colorado, for judgment on the pleadings.

Eighth. In adjudging that the plaintiff in error was guilty of contempt.

Ninth. In not permitting the plaintiff in error to introduce evidence in the cause, and in denying to the plaintiff the right to prove the truth of the allegations contained in his answer.

Tenth. In denying to plaintiff the opportunity and privilege of proving the truth of the publications complained of in the information.

Eleventh. In ordering and adjudging that the plaintiff in error, Thomas M. Patterson, be fined in the sum of $1,000.

Twelfth. In ordering and adjudging that the plaintiff in error, Thomas M. Patterson, stand committed to the common jail of the city and county of Denver until such fine and costs are paid.

POINTS OF LAW.

THIS COURT HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF COLORADO IN THIS CASE.

NO TREATY OR FEDERAL STATUTE OF, OR ANY AUTHORITY EXERCISED UNDER, THE UNITED STATES IS INVOLVED.

The judgment in this cause is a final judgment or decree rendered by the highest court of the state of Colorado, and there is not drawn into question the validity of any treaty or statute of, or any authority exercised under, the United States, nor is the judgment or decree entered therein a decision against the validity of either.

NO STATUTE OF, OR AUTHORITY EXERCISED UNDER, THE STATE OF COLORADO IS INVOLVED ON THE GROUND OF THEIR BEING REPUGNANT TO THE CONSTITUTION, TREATIES OR LAWS OF THE UNITED STATES.

The legislature of the territory of Colorado in 1861 adopted the common law of England, so far as applicable and of a general nature, as well as all the acts and statutes of a general nature passed by the British parliament in aid of the common law prior to the fourth year of James I.

Laws of Colorado, 1861, page 35.

A following legislature, in 1868, repealed this statute, but afterwards, at the same session, re-enacted it, and it has ever since remained in force in

this commonwealth. (2 Mills' Ann. Stat., section 4184.)

Herr vs. Johnson, 11 Colo., 393, 396.
Chilcott et al. vs. Hart, 23 Colo., 40, 51.
Teller vs. Hill, 18 Colo. App., 509, 512.

The Constitution of the state of Colorado was adopted July 1, 1876, and the Supreme Court of such state was created and its duties defined by article VI thereof.

1 Mills' Ann. Stat., page 252.

The original thirteen states inherited the common law, and so held it at the time of the adoption of their respective Constitutions. Colorado adopted the common law by legislative enactment, and so held it at the time of the adoption of its Constitution.

When the courts of those states came into existence by constitutional creation, they became possessed of common law powers by reason of the existence of the common law in their respective jurisdictions; and for the same reason, when the Supreme Court of Colorado came into existence, by virtue of the Constitution of such state, it became possessed of common law powers, except as otherwise provided in said instrument.

The Supreme Court of the state of Colorado, therefore, is a constitutional court, with common law powers, and right of self-preservation is an inherent right in such courts.

Rapalje on Contempts, section 1.
Abbott's Trial Brief (Crim., 2d Ed.), 13.
7 Am. & Eng. En. Law (2d Ed.), 30.
9 Cyc. of Law & Proc., 26.

2 Bish. New. Crim. Law, section 243.
Ex parte Bollman, 4 Cranch, 75, 94.
U. S. vs. Hudson, 7 Cranch, 32, 34.
Anderson vs. Dunn, 6 Wheat., 204, 227.
Ex parte Kearney, 7 Wheat., 39, 42.
Randall vs. Brigham, 7 Wall., 523, 540.
Ex parte Robinson, 19 Wall., 505, 510.
Ex parte Terry, 128 U. S., 289, 303, *et seq.*
Ex parte Savin, 131 U. S., 267, 275.
In re Debbs, 158 U. S., 564, 596.

This being true, it follows that the legislature is without power to limit or restrict the exercise of such inherent power, whenever the latter is necessary for the protection and preservation of the efficiency and usefulness of such court; and it is self-evident that any act of the legislature which would require an affidavit to be first filed in a contempt of the kind at bar, before any action could be taken by the court, without giving the latter any power to demand or compel the making or filing of such affidavit, not only limits and restricts the inherent power to punish for contempt, but in many instances it might entirely nullify such power.

Rapalje on Contempts, section 1.
Abbott's Trial Brief (Crim., 2nd Ed.), note, page 13.
9 Cyc. Law. & Proc., 27, and cases cited under note 40.
7 Am. & Eng. Enc. Law (2nd Ed.), 33, and cases cited under note 1.
Ex parte Robinson, 19 Wall., 505, 510.

This principle of law, as laid down in the above text-books, is supported by the decisions of the highest courts in nearly all the states of the Union, and the reasoning employed by such courts may be fairly illustrated by the language used by Mr. Justice Holloway, of the Supreme Court of Montana, in the late case of *State vs. Clancy,* reported in 30 Mont., 193, in which, at page 200, he says that no legislation can be effective which so far abridges, impairs or cripples this inherent power as to leave the courts without ample and vigorous means of protecting themselves from insult, or from effectually enforcing their lawful orders, and that as this power is inherent in District Courts, it is truismatic to say that a power which the legislature does not give, it can not take away.

Mr. Justice Lindsay, in delivering the opinion in the case of *In re Woolley,* 11 Bush., 95, at page 111, says that the right of self-preservation is an inherent right in the courts; that it is not derived from the legislature, nor can it be made to depend upon legislative will; that the power of the legislative department to interfere with the manner in which the judicial department shall protect itself against insults and indignities is denied by the Supreme Court of Arkansas in *State vs. Morrill,* 16 Ark., 384, and doubted by this court in *Ex parte Robinson,* 19 Wall., 510.

Again, Mr. Justice Winslow in *State vs. Circuit Court,* 97 Wis., 1, at page 8, says that the power of superior courts, created by the Constitution, to punish such acts is necessarily inherent in such courts, and arises by implication from the very act creating them; that a court without this power would be at

best a mere debating society and not a court, and that these principles have been recognized in all courts from time immemorial.

The Articles and Cartoon in Case at Bar Constitute Criminal Not Civil Contempt.

That the contemptuous articles and cartoon published by plaintiff in error herein constitute criminal and not civil contempt is supported by all of the authorities

Odgers, Libel and Slander (3d Ed.), 519-24.

7 Am. & Eng. Enc. Law (2d Ed.), 59.

9 Cyc. Law & Proc., 20.

2 Bish. New Crim. Law, section 259.

Abbott's Trial Brief (Crim., 2d Ed.), 15.

Colorado Code of Civil Procedure.

After the adoption of the Constitution of Colorado, the legislature of that state, in 1877, adopted the Code of Civil Procedure, and by chapter 34 of such Code provided for a mode of procedure in cases of civil contempt. All of the portions of the chapter pertaining to the points raised in the case at bar were re-enacted and appear in chapter 30 of Mills' Annotated Code.

Plaintiff in error, upon the hearing of this cause in the Supreme Court of Colorado, contended that the alleged contempt committed by him was not com-

mitted in the immediate view and presence of the court, and that, according to section 322 of the Civil Code, it was necessary, in order to give the court jurisdiction, that an affidavit containing the facts constituting the contempt should be first presented to such court.

Section 321 of the Civil Code of Colorado provides that:

> "The following acts or omissions shall be deemed contempt:
>
> "First—Disorderly, contemptuous or insolent behavior towards the judge whilst holding court or engaged in his judicial duties at chambers, or towards referees or arbitrators, while sitting on a referee or arbitration, tending to interrupt the due process of a trial, referee or arbitration or other judicial proceedings.
>
> "Second—A breach of the peace, boisterous conduct, or violent disturbance in the presence of the court, or its immediate vicinity, tending to interrupt the due course of a trial or judicial proceedings.
>
> "Third—Disobedience to any lawful writ, order, rule or process issued by the court, or judge at chambers.
>
> "Fourth—Disobedience of a subpœna duly served, or refusing to be sworn or answer as a witness.
>
> "Fifth—Rescuing any person or property in the custody of an officer by virtue of an order or process of such court or judge at chambers."

And section 322, above referred to, reads as follows:

> "When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order shall be made reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators."

From the authorities heretofore cited in support of the inherent power of the court to punish for criminal contempt, it is evident that if the Civil Code provisions of the state of Colorado, above referred to, should be held to apply to criminal contempts, such law would be unconstitutional and not binding upon the courts. However, the Supreme Court of the state of Colorado has many times passed upon this chapter of the Civil Code, and uniformly held that it did not apply to contempts of the description of the one at bar.

Hughes vs. People, 5 Colo., 436, 446.
Cooper vs. People, 13 Colo., 337, 356.
Wyatt vs. People, 17 Colo., 252, 260.
People vs. Stapleton, 18 Colo., 568, 582.
Bloom vs. People, 23 Colo., 416, 424.

This is the construction put upon this Code provision by the highest court of the state of Colorado, and this court long since established the rule that in such cases it would adopt such construction as its own, if not contrary to the federal Constitution, treaties or laws.

McCutcheon vs. Marshall, 8 Peters, 235, 240.

Leffingwell vs. Warren, 2 Black, 599, 603.

Insurance Co. vs. The Treasurer, 11 Wall., 204, 208.

Erie Ry. Co. vs. Pennsylvania, 21 Wall., 492, 497.

People vs. Weaver, 100 U. S., 539, 541.

Morley vs. L. S. R. R., 146 U. S., 162, 167.

Noble vs. Mitchell, 164 U. S., 367, 372.

Osborne vs. Florida, 164 U. S., 650, 654.

In the case at bar the Supreme Court of Colorado did not pass upon the validity of the above provisions, but simply held that they did not apply to criminal contempt. So this court has no jurisdiction to review such action.

Cockroft vs. Vose, 14 Wall., 5, 8.

Bank, etc., vs. Citizens' Bank, 14 Wall., 9, 10.

Palmer vs. Marston, 14 Wall., 10, 12.

Sevier vs. Haskell, 14 Wall., 12, 14.

Marqueze vs. Bloom, 14 Wall., 351, 352.

McKenna vs. Simpson, 129 U. S., 506, 510.

Newport Light Co. vs. Newport, 151 U. S., 527, 540.

Sections 7, 10 and 25 of Article II of the Constitution of Colorado Violated.

Plaintiff in error contends that the judgment was entered against him in this case in contravention of sections 7, 10 and 25 of article II of the Constitution of Colorado.

Section 7 reads:

> "That the people shall be secure, in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing."

Section 8 reads:

> "That, until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment; except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. In all other cases, offenses shall be prosecuted, criminally, by indictment or information."

Section 10 reads:

> "That no law shall be passed impairing the freedom of speech; that every person

shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

Section 16 provides:

"That in criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Section 23 reads:

"The right of trial by jury shall remain inviolate in criminal cases, * * *"

Section 25 reads:

"That no person shall be deprived of life, liberty or property without due process of law."

If *criminal contempts* should be classified as *criminal actions,* then all of the above provisions would apply in the trial of a person charged with

such contempt. But all of the courts hold that criminal contempts are not so classified, and that therefore these constitutional provisions do not apply to them, for the reason that courts have always had, and it is necessary for their successful existence to continue to have, the inherent power to punish for criminal contempt.

4 Blackstone's Com., 285, 286.

Rapalje on Contempts, sections 10, 112.

Cooley Const. Lim. (7th Ed.), page 453, note 2.

2 Hare's Am. Const. Law, pages 869-871.

2 Bish. New Crim. Law, section 269.

The Fourteenth Amendment (Brannon), pages 162, 473.

Interstate Com. Com. vs. Brimson, 154 U. S., 447, 488.

In re Debs, 158 U. S., 564, 594-596.

It is evident that this rule must apply alike to either direct or constructive contempts. For, if the court has the inherent power to punish a person who offers it insult in its immediate presence, and such person can be punished summarily without violating these constitutional provisions, then the same reasons may be urged in favor of his punishment for constructive contempt, after having been fully apprised of the charges against him and having been given an opportunity to be heard in his own defense, without violating such provisions, for exactly the same principle is involved in each instance. There can be no argument advanced as to one that can not be urged with equal force as to the other.

Liberty of the Press.

While freedom of the press, like that of freedom of speech, is necessary to the perpetuation of a republican form of government, this does not mean that either can be carried to such an extreme as to impede, embarrass, or unjustly influence the due and orderly administration of justice, or prejudice the rights of litigants in pending cases, for the latter would more surely impair the existence of our government than the former.

While the accepted definition of *freedom of speech* is as broad in its terms as that of *liberty of the press*, it has never been presumed that this constitutional safeguard meant that the citizen could so use it as to impede, obstruct or embarrass the due and orderly administration of justice, or prevent fair and impartial action concerning pending cases by threats or other form of intimidation against the court or its judges without being summarily punished therefor.

The Supreme Court of Colorado did not hold in this case that the respondent, as editor and publisher of said newspapers, could not criticise its decisions after having been finally disposed of. Nor did it hold that he could not, through the columns of such newspaper, without being subject to contempt of court, impute whatever corrupt or improper motives he saw fit to the court or its judges in rendering decisions in cases which had been finally disposed of at the time of such publications, but that he would be responsible only for the abuse of such liberty to the individual judges.

Nor did it hold that its decisions and actions were not open to all just and reasonable criticism; nor that

the fidelity or infidelity with which its judges discharged their duties was not open to newspaper comment. But it did unequivocally hold that the rights of litigants before it should be determined by the court without any appearance of threats or undue influence being brought to bear upon its judges during the pendency of the proceedings involving such rights.

This we believe to be in harmony with the most liberal construction of the term *liberty of the press.*

Cooley's Const. Lim. (7th Ed.), pages 604-605.

7 Am. & Eng. Enc. Law (2nd Ed.), 59.

9 Cyc. Law and Proc., 20.

2 Bish. New Crim. Law, section 259.

Abbott's New Trial Brief (Crim., 2nd Ed.), 15.

Oger's Libel & Slander (3rd Ed.), pages 519-524.

This interpretation of the above constitutional provisions in relation to contempt proceedings of the nature of the one at bar is the interpretation long since adopted and consistently followed by the courts of the state of Colorado.

Hughes vs. People, 5 Colo., 436, 445-454.

Cooper vs. People, 13 Colo., 337, 356-368.

Wyatt vs. People, 17 Colo., 252, 257-261.

Stapleton vs. People, 18 Colo., 568, 573-589.

Bloom vs. People, 23 Colo., 416, 418-425.

In *Randall vs. Brigham*, 7 Wall., 523, Mr. Justice Field, in referring to the contention of the plaintiff in error in that case that he had been illegally deprived of certain rights to which he was entitled under certain provisions of the Constitution of the state of Massachusetts similar to those of the state of Colorado, at page 541, says that such contention is answered by the construction which the Supreme Court of that state had given to such provisions, and that the construction of the highest court of a state not called in question by conflicting decisions of that court is conclusive upon this court.

Provident Inst. vs. Mass., 6 Wall., 611, 630.

East Hartford vs. Hartford Bridge Co., 10 How., 511, 539.

Webster vs. Cooper, 14 How., 495, 504.

Hall vs. Decuir, 95 U. S., 485, 500.

Louisiana vs. Pilsbury, 105 U. S., 278, 294.

NO TITLE, RIGHT, PRIVILEGE, OR IMMUNITY UNDER THE CONSTITUTION, OR ANY TREATY OR STATUTE OF, OR COMMISSION HELD, OR AUTHORITY EXERCISED UNDER, THE UNITED STATES IS INVOLVED.

Plaintiff in error contends that the judgment entered against him is in contravention of that portion of the Fourteenth Amendment to the Constitution of the United States, providing that:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any per-

son of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Due Process of Law.

The term *due process of law* has many times been interpreted by this court and by the numerous army of text-book writers, but probably it has never been more clearly defined than by Mr. Justice Bradley in *Ex parte Wall,* 107 U. S., 265, at page 289, where he says, in brief, that it is a mistaken idea that due process of law requires a plenary suit and a trial by jury in all cases where property or personal rights are involved. That many times the right of personal liberty is determined by a single judge on a writ of *habeas corpus,* using only affidavit or depositions for the establishment of the facts in connection therewith. That conflicting claims of creditors amounting to thousands of dollars are often settled by the courts on affidavit or depositions alone, and that in all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established customs and usages of the courts. Continuing, the learned justice cites with approval the definition given by Mr. Webster in the Dartmouth College case, to the effect that by the law of the land is intended that general law which hears before it condemns; and which proceeds upon inquiry and renders judgment only after trial; meaning thereby that every citizen shall hold his life, liberty

and property under the protection of the general rules which govern society.

Randall vs. Brigham, 7 Wall., 523, 539.

Eilenbecker vs. Plymouth, 134 U. S., 31, 36.

Interstate Commerce vs. Brimson, 154 U. S., 447, 489.

In re Debs, 158 U. S., 564, 596.

The Fourteenth Amendment (Brannon), 162, 473.

Cooley's Const. Lim. (7th Ed.), 506.

Equal Protection of the Law.

The meaning of this portion of the Fourteenth Amendment has also many times been considered by this court and held to mean that equal protection and security shall be given to all alike under like circumstances in the enjoyment of their personal and civil rights. That all persons shall be equally entitled to pursue happiness and to acquire and enjoy property. That no greater restriction shall be placed upon the personal rights of one than upon those of another. That all shall have the same rights and the same treatment before the courts, and that no higher or different punishment shall be imposed upon one than upon others for like offenses.

Barbier vs. Connolley, 113 U. S., 27, 31.

Pembina vs. Pennsylvania, 125 U. S., 181, 188.

In re Kemmler, 136 U. S., 436, 448.

In re Debs, 158 U. S., 564, 596.

This court has held that, in disbarment proceedings, it is not necessary that the charges should be founded upon formal allegations against the attorneys, but that they may be instituted by the court of its own motion from information either obtained during the progress of a trial or from personal observation. That the only essential requirement is that when the matters did not occur in open court in the presence of the judges, notice should be given the accused attorney of the charges made, and opportunity be afforded him for explanation and defense, and the manner in which the proceeding shall be conducted, so that it be without oppression or interference, is a matter of judicial regulation.

Brigham vs. Randall, 7 Wall., 523, 540.
Ex parte Wall, 107 U. S., 265, 271.

Mr. Justice Harlan in *Ex parte Savin*, 131 U. S., 267, a case in which the appellant had sought by writ of habeas corpus to be released from a punishment imposed for contempt, after citing with approval the language used in Randall vs. Brigham, *supra*, at page 279, holds that the trial court may adopt such mode of treating the question of contempt as it deems proper, only so that persons charged be given an opportunity for explanation and defense.

It has also been held by this court that the right to the equal protection of the law is not denied by a state court in contempt proceedings when it is apparent that the same law or course of procedure

would be applied to any other person in the state under similar circumstances and conditions.

Tinsley vs. Anderson, 171 U. S., 101, 106.
The Fourteenth Amendment (Brannon), 336.

In the case at bar the respondent was in the first instance served with a copy of the information, in which were set forth in full the facts constituting the charge against him, and also the rule to show cause, which latter gave him nearly four months within which to appear and answer the charges set forth in the information. He was thus clearly advised of the charges preferred against him and given ample opportunity to appear and answer the same.

Under the authorities, the office of the citation is to bring him into court. He appeared on the 23d day of October with his motion to quash the citation and dismiss the information. His appearance at that time was a general one, because his motion went to the merits, assigning, among other grounds, that the information did not state facts sufficient to constitute the charge of contempt. After this motion was overruled, he answered, admitting the publication of the articles and cartoon, as charged, to be true.

In the last of the articles published by him he avowed his responsibility for their publication, yet not until after the filing of his answer, admitting the publication, was an attachment issued for his arrest. And not even then until after a motion for judgment upon the pleadings was considered—that is, judgment upon the information and the answer.

The procedure certainly would not have been different had the information been verified. He was

just as fully advised of the matters he was called upon to answer as he would have been in that case. No constitutional right of the respondent was invaded in issuing the citation upon an unverified information, because the constitutional provisions of the state of Colorado do not cover the offense of contempt, but leave this violation of the law, both as to procedure and its defense and the manner of punishment, the same as it was at common law. Therefore, according to the decisions of this court, the plaintiff in error was not prejudiced by the absence of such verification.

Randall vs. Brigham, 7 Wall., 523,539-541.

Ex parte Wall, 107 U. S., 265, 271-289.

Barbier vs. Connolley, 113 U. S., 27, 31-32.

Pembina vs. Pennsylvania, 125 U. S., 181, 188.

Ex parte Savin, 131 U. S., 267, 275-279.

In re Kemmler, 136 U. S., 436, 448.

Interstate Com. Com. vs. Brimson, 154 U. S., 447, 488.

In re Debs, 158 U. S., 564, 596.

EVEN IF THE RECORD IN THIS CAUSE MAY SHOW THAT THIS COURT HAS JURISDICTION IN THE PREMISES, YET IT IS MANIFEST THAT THE WRIT OF ERROR HEREIN WAS OBTAINED FOR DELAY ONLY, AS THE QUESTIONS OF LAW HAVE ALREADY BEEN DETERMINED BY THIS COURT CONTRARY TO THE CONTENTION OF PLAINTIFF IN ERROR.

While there are some twelve assignments of error filed in this case, as several of them refer to the same

alleged erroneous action of the Supreme Court of the state of Colorado, for the purpose of this argument, they may be conveniently divided into four general assignments, to wit:

First. Error in not requiring the information filed by the attorney-general of Colorado to be verified before issuing the rule to show cause.

Second. Error in sustaining the motion of said attorney-general for judgment on the pleadings.

Third. Error in not allowing the respondent below, Thomas M. Patterson, the right to prove the alleged truth of the matters upon which said contemptuous articles and cartoon were alleged to be based.

Fourth. Error in adjudging that said respondent was guilty of contempt in publishing such articles and cartoon.

FIRST: ERROR IN NOT REQUIRING THE INFORMATION FILED BY THE ATTORNEY-GENERAL TO BE VERIFIED BEFORE ISSUING THE RULE TO SHOW CAUSE.

Supreme Court of Colorado.

As before stated, the Supreme Court of Colorado is a constitutional court, with common-law powers, and therefore the legislature can not pass any law limiting or restricting its inherent power to punish contempts. In addition, it has been repeatedly held by the highest court of that state that the Code provisions relied upon by plaintiff in error do not apply to criminal contempts, such as that in the case at bar; and as there are no other statutory provisions in regard to contempts, it follows that the legislature

of that state has never attempted to restrict such inherent power in the courts.

Since this court has many times held, as before stated, that it will adopt the construction put upon a statute by the highest court of a state, it necessarily follows that the common-law procedure in cases of criminal contempt prevails in Colorado.

Attorney-General of Colorado.

The office of attorney-general is as ancient as the common law itself, and from the earliest times it has been his duty to file informations. These informations were filed by him *ex-officio*, his official oath being considered the equivalent of a verification.

4 Black. Com., 308-310.

5 Bacon's Abridgment, 180.

1 Chitty's Crim. Law, 845.

2 Chitty's Gen. Prac., 159.

11 Har. State Trials, 270.

1 Bish. New Crim. Pro., sections 142, 144, 713.

The Constitution of Colorado, in providing for the office of attorney-general, simply mentions the office by title, states the qualifications necessary for such office, and enumerates the different state boards of which he shall be a member.

Colo. Const., Art. IV.

It contains no definition of his power or authority, but like that of the office of sheriff, his powers

and duties remain the same as at common law, unless otherwise restricted.

In England the attorney-general filed his information in all the more serious crimes and misdemeanors, in trespasses affecting the land of the king, in certain corporation matters and in matters of charity which affected the people at large.

The legislature of Colorado has conferred many of the powers exercised by the attorney-general in England upon the district attorney, a new officer created by the Constitution of that state, which office, under various names, exists in most of the states of the Union, and when a legislature places any of the common-law duties of the attorney-general upon the district attorney or similar officer, it is to be presumed, of course, that the attorney-general no longer performs such duties.

Since the Constitution of Colorado has created the office of district attorney, and the legislature therewith defined his duties, and among others, directed that he should prosecute criminal cases in *nisi prius* courts, the former prerogative of the attorney-general to file informations in cases of crimes, is taken away; nor has he the authority to file an information in civil contempts, as such procedure is governed by the Civil Code, to which reference has heretofore been made.

The statutes of Colorado, to a very limited extent, define some of the duties of the attorney-general. He is required to prosecute suits in the Supreme Court, and in such inferior courts as the governor or legislature may direct; to prepare contracts and to give opinions in writing when requested so to do by the

legislative or executive department; and to remain at the seat of government during the sessions of the legislature and of the Supreme Court.

Aside from this, his duties have been left as they existed at common law.

This subject has been so fully and learnedly discussed in *Hunt vs. Chicago,* 20 Ill. App., 282, that we desire to call this court's attention to the opinion delivered by that court, as it is exhaustive in character and directly in point with the matter now under discussion.

In that case it was contended that the attorney-general of Illinois had not the authority to file an information to restrain a railroad from constructing and operating its lines upon certain of the streets of Chicago. The state of Illinois, like that of Colorado, passed an act in regard to the duties of the attorney-general and the state's attorneys, describing specifically the duties to be performed by each, but among them was not mentioned the power to bring the kind of suit in question. The court, at page 287 of the opinion, said that it may be difficult to enumerate all the powers vested in the attorney-general at common law, but that it was not for the purposes of that case to say that it was a part of his common-law duty to institute proceedings in chancery to restrain and abate nuisances; that in the organization of state governments in this country, most, if not all, of the commonwealths which derived their systems of jurisprudence from England adopted the office of attorney-general as it existed in that country, as part of the machinery of the respective governments; that the prerogatives which pertained to the crown of England

were vestd in the people, and that the necessity for the existence of a public officer charged with the protection of public rights, is just as imperative here as there; that the duties of such an office are so numerous and varied that it has been the policy of the legislature of this country not to attempt the difficult task of enumerating them exhaustively, but that it has been deemed best, after defining such of them as it saw fit, to leave the residue as they existed at common law, so far as applicable to our jurisprudence system of government. And that the office of attorney-general in Illinois was the same as the common-law office, and the powers and duties analogous to those of the attorney-general in England.

In other states it has also been frequently held that where the duties of the attorney-general are prescribed by statute, there are still common-law powers incident to the office which are not derived from the Constitution or statutes.

Parker vs. May, 5 Cush., 336, 338.

People vs. Miner, 2 Lans. (N. Y.), 396, 397.

People vs. Tweed, 13 Abbott's Prac. (N. S.), 25, 41.

People vs. Vanderbilt, 26 N. Y., 287, 293.

Attorney-General vs. City of Detroit, 26 Mich., 262, 263.

Newberry vs. Blatchford, 106 Ill., 584, 595.

The text books and English authorities cited show that from the most ancient times the right of the attorney-general to file an information, when the integrity and honor of the court has been assailed, has never been denied, nor can any authority in this

country be found denying such right; but, on the contrary, wherever it has been passed upon by the highest courts of the state, it has been upheld. The denial has related to the constitutional or statutory office of district attorney.

State ex rel. Crow vs. Shepherd, 177 Mo., 205, 229.

People vs. Wilson, 64 Ill., 195, 197.

Com. vs. Feeley, 2 Va. Cas., 1, 2.

Cartwright's Case, 114 Mass., 230, 231.

In *State ex rel. Crow vs. Shepherd, supra*, the attorney-general of that state filed an information *ex officio*, as in this case, against the publisher of a newspaper, which had published a contemptuous article against the Supreme Court of that state, and the respondent in that case, as in this, raised the question that the proceedings were not by due process of law. That court, in a lengthy and well-considered opinion, after exhaustively reviewing the authorities, held that the statutes of that state, which attempted to limit the powers of that court, were unconstitutional, and that no other provisions of the Constitution were violated by such proceedings. In reference to the contention that the process was not in proper form, the court, at page 208, said that criminal contempts are acts committed against the majesty of the law, or against the courts as an agency of government, in which, therefore, the state and the whole people were concerned. That in such cases the proceeding is punitive, and the punishment operates *in terrorem*, and by that means has a tendency to prevent the repetition of the offense. That the power to

punish is the same in direct as in constructive contempt, the difference being only one of procedure, and that in cases of direct contempts the court acts spontaneously *ex mero motu*, and commits the offender summarily. But that in cases of constructive contempts the court, upon the information furnished by any citizen and verified by affidavit, or exhibited by the attorney-general *ex officio*, which is supported by his official oath, and therefore needs no other verification, or even upon its own information or motion, can issue a citation to the offender to show cause why he should not be punished for contempt.

No Information Necessary in This Case.

The nature of the contempt in this case would warrant the court in entering a rule of its own motion, requiring the respondent to appear and show cause why he should not be punished for contempt. The articles and cartoon complained of appeared in daily newspapers, circulated in the city and in the building where the court was held. At the head of the editorial columns of the papers the fact was recited that each was published by The News-Times Publishing Company. In an interview with the plaintiff in error herein, appearing in the Rocky Mountain News of the morning of the day on which the information was filed, he admitted that he was responsible for the articles and cartoon appearing in said paper. So that all of the facts within the knowledge of the attorney-general must also have been within the knowledge of the members of the Supreme Court, or at least sufficient facts appeared from the various articles to

entitle the court to issue the rule to show cause. If such publications can obstruct, embarrass or impede the due administration of justice, they are analogous to direct contempts, and can be proceeded against accordingly.

The question of whether newspaper publications are constructive contempts, in the sense that an affidavit must be filed upon which to issue the citation, has been many times passed upon by the highest courts of different states, and it has invariably been held that an affidavit is not necessary.

Meyers vs. State, 46 Ohio St., 473, 490-492.

Telegram Newspaper Co. vs. Com., 172 Mass., 294, 298.

People ex rel. Horace Greeley vs. Court of O. and T., 27 How. Prac., 14, 18.

Matter of B. F. Moore and others, 63 N. C., 397, 404.

People vs. Court of Sessions, 31 N. Y. S., 373, 375, 377.

In re State vs. Post, Ohio N. P., 157, 159.

In re Deaton, 105 N. C., 59, 64.

State vs. Frew, 24 W. Va., 416, 471.

State vs. Morrill, 16 Ark., 384, 385.

In the matter of Sturoc, 48 N. H., 428, 431.

State vs. Shepherd, 177 Mo., 205, 229.

SECOND: ERROR IN SUSTAINING THE MOTION OF SAID ATTORNEY-GENERAL FOR JUDGMENT ON THE PLEADINGS.

The articles and cartoon complained of are set forth at length in the information filed by the attor-

ney-general. In his answer, the plaintiff in error herein admitted that he was, during all of said time, the principal stockholder of The News-Times Publishing Company, and was the editor of said newspapers, and that the several articles printed therein and set forth in the information were either written by him or published with his approval and consent, except as to the head line alleged to be associated with the cartoon and the sub-heads contained in said articles; that none of said articles were contemptuous of the said Supreme Court or any of its judges; that they were legal and justifiable comment upon grave and important public issues, and were further justifiable on account of certain facts and events occurring before their publication, and these facts and events as alleged to justify said articles and cartoon are then set forth at great length in his answer.

Clearly, if the articles complained of constituted contempt, and the plaintiff in error herein admitted his responsibility for their production and publication, there is nothing left to prove in this connection; and the only question then involved was whether such articles, whether they were true or otherwise, constituted contempt of court. This question, which is purely one of law, was fairly presented to the Supreme Court of Colorado by the motion of the attorney-general for judgment upon the pleadings. Plaintiff in error has, therefore, no just cause to complain that he was not granted a hearing in that court.

THIRD: ERROR IN NOT ALLOWING THE RESPONDENT BELOW, THOMAS M. PATTERSON, THE RIGHT TO PROVE THE ALLEGED TRUTH OF THE MATTERS UPON WHICH SAID CONTEMPTUOUS ARTICLES AND CARTOON WERE ALLEGED TO BE BASED.

The answer filed by the respondent below set up the alleged truth of the statements made in the publications, and while, of course, we deny that such statements were true, either in whole or in part, for the purpose of discussing this assignment, we will presume that the matters set up in his answer were true.

The gist of the contempt in cases like the one at bar is that the publication is calculated to prejudice or prevent fair and impartial decisions by the court against which it is directed in cases then pending before it.

The publication is a species of threat or other form of intimidation, used for the purpose of impeding, interrupting or embarrassing the due and orderly administration of justice in reference to such cases.

7 Am. & Eng. Enc. Law (2d Ed.), 59.

9 Cyc. Law and Proc., 20.

2 Bish. New Crim. Law, section 259.

Abbott's Trial Brief (Crim., 2d Ed.), 15.

It is unreasonable to say that the ordinary judge can not be embarrassed or even influenced to some extent by the publication of articles and cartoon like the ones in the case at bar, especially when published in two of the most important metropolitan dailies of the Rocky Mountain region, and edited and controlled by a United States senator! The timid judge would be

somewhat inclined to favor so powerful an influence; the obstinate judge would be more inclined to further antagonize such influence; while rare indeed would be that judge who could pursue the even tenor of his ways and who could calmly and dispassionately rule upon questions of gravest importance without being embarrassed, influenced or intimidated by such editorial and front-page articles published in powerful political papers, which are universally recognized as the greatest factors in the moulding—either rightfully or wrongfully—of public opinion.

While it is undoubtedly true that the judges of the Supreme Court of Colorado were not influenced by these articles in the final determination of the cases then pending before them, it in no wise changes the rule that clients are entitled to have their rights litigated in courts of justice without such courts being exposed to threats, intimidations and undue influence.

It is the rights of these litigants that the courts are in duty bound to protect; and the fact that these articles so published at the same time libelled the judges, is no reason why the rule of evidence applying to libels, to the effect that the truth thereof may be given in evidence, should apply to criminal contempts. And whenever this question has been passed upon the courts have so held.

Globe Newspaper Co. vs. Com. (Mass., June, '05), 74 N. E., 682.

Tel. Newspaper Co. vs. Com., 172 Mass., 294.

State vs. Garland, 25 La. Ann., 532.

People vs. Court of Sessions, 82 Hunn., 242.

Hughes vs. People 5 Colo., 436, 452.
State vs. Frew, 24 W. Va., 416.
Meyers vs. State, 46 Ohio St., 473.
People vs. Court of Sessions, 147 N. Y., 290.

It is necessarily immaterial, so far as the rights of the litigants are concerned, whether the charges against the judges are true or false, for, in either instance, the litigants are still entitled to have their causes heard by a tribunal unprejudiced and unembarrassed by any outside influence whatsoever.

It may be true that the overwhelming majority of judges and jurors are not susceptible to bribes, but still the people have deemed it necessary to provide a punishment for bribers or givers of bribes. If the people have deemed it essential to the existence of justice in a republican form of government to take this precaution in regard to the corrupting influences of a few paltry dollars, how much more necessary is is to protect our highest tribunal, during the pendency and consideration of grave affairs, from immeasureably more powerful influences—that of a political press?

FOURTH: ERROR IN CHARGING THAT THIS RESPONDENT WAS GUILTY OF CONTEMPT IN PUBLISHING SAID ARTICLES.

These articles were set forth at length in the information, appearing at pages 4-11 of the printed record herein.

In no unmistakable terms they charge the Supreme Court of the state of Colorado and certain of

its judges with having been influenced by corrupt motives in ruling theretofore made in certain causes commonly known as the "County Offices Election Cases," then pending in said court, and not finally passed on, and that they would continue to be so influenced in the final disposition of them, as well as in the determination of what was commonly known as the "Auditorium Case," in which no action had as yet been taken by such court. It is true that the decisions in "County Election Offices Cases" had been handed down, but the time for filing petitions for re-hearing had not yet expired; and, as a matter of fact, such petitions were filed on the 30th day of June, 1905, the date of the publication of the alleged interview with plaintiff in error herein, in which he admitted his responsibility for the publication of such articles; and it is further true that all of the decisions in these cases save one were afterwards materially modified. These were pending cases under the rules of court practice.

Re Chadwick, 100 Mich., 588.

The "Auditorium Case," at the time of such publications, had been argued orally and submitted, and was then under consideration by the court, and from a perusal of the articles, it is apparent that not only was it the intention of the respondent to compel the court to modify the decisions already handed down, but what he seemingly more desired, was an opinion in the "Auditorium Case" satisfactory to him.

It needs no argument upon our part to show the contemptuous nature of these articles and the cartoon. The simple examination of them by this court is sufficient.

The only question remaining, therefore, is whether newspaper publications of this nature, published under the then existing circumstances, constitute criminal contempt. The authorities are unanimous in the affirmative.

Odgers, Libel & Slander (3rd Ed.), pages 519-524.

7 Am. & Eng. Enc. Law (2nd Ed.), 59.

9 Cyc. Law & Proc., 20.

2 Bish. New Crim. Law, section 259.

Abbott's Trial Brief (Crim., 2nd Ed.), 15.

In re Printer, etc., 2 A. T. K., 469.

Littler vs. Thomas, 2 Beav., 129.

Tichborne vs. Mostyn, L. R. 7 Eq. 55, note 1.

In re Chiltenham, etc., Co., L. R. Eq., 580.

Regis v. Wilkinson, 41 U. S. Q. B., 42, 47.

People vs. Wilson, 64 Ill., 196.

Hollingsworth vs. Duance, Wall. C. C., 77.

U. S. vs. Duance, Wall. C. C., 102.

Gorman Mfg. Co. vs. Emery, etc., Co., 97 Fed., 794.

Telegram Newspaper Co. vs. Com., 172 Mass., 292.

Matter of B. F. Moore and others, 63 N. C., 397.

People ex rel Horace Greeley vs. Court O. & T., 27; How. Prac., 14.

Meyers vs. State, 46 Oh. St., 473.

State vs. Shepherd, 177 Mo., 205.

In re State vs. Post, 4 Oh. M. P., 157.

People vs. Court Sessions, 31 N. Y. Supp., 373; 82 Hun., 242.

In re Deaton, 105 N. C., 59.

State vs. Frew and Hart, 24 W. Va., 416.

State vs. Morrill, 16 Ark., 384.

Matter of Sturoc, 48 N. H., 428; 97 Am. Dec., 626.

Cooper vs. People, 13 Colo., 252, 260.

Wyatt vs. People, 17 Colo., 252.

People vs. Stapleton, 18 Colo., 568.

Bloom vs. People, 23 Colo., 416, and numerous other cases cited in the above text-books.

We respectfully submit, therefore, that this cause should be dismissed for the want of jurisdiction in this court to review the same; or, if it should be held that such jurisdiction does exist, that the judgment of the Supreme Court of Colorado should be affirmed.

N. C. Miller.

Attorney-General of Colorado.

J. B. Melville

Of Counsel.